

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

TAD MCGEER, et al.,

Plaintiffs,

v.

BNSF RAILWAY COMPANY, et al.,

Defendants.

CASE NO. C09-5330 BHS

ORDER ALLOWING  
ADDITIONAL BRIEFING AND  
RENOTING THE MOTION FOR  
RECONSIDERATION

This matter comes before the Court on Plaintiffs' motion for partial reconsideration (Dkt. 84). The Court has considered the pleadings filed in support of the motion and the remainder of the file, and hereby allows for additional briefing and renotes the motion for the reasons stated herein.

**I. PROCEDURAL HISTORY**

On February 13, 2013, BNSF filed a motion for partial summary judgment against Plaintiffs. Dkt. 77. On March 1, 2013, Plaintiffs filed a response, which did not oppose the majority of BNSF's motion for partial summary judgment. Dkt. 79. On March 8, 2013, BNSF filed a reply brief. Dkt. 80.

On March 29, 2013, the Court granted BNSF's motion for partial summary judgment. Dkt. 83. Finding the motion largely unopposed, the Court determined the only remaining issue BNSF asked the Court to decide is "whether damages for loss of use

1 and enjoyment of Plaintiffs' property, personal discomfort, annoyance, irritation and  
2 anguish are available where their claim for nuisance is based solely on negligence or  
3 negligent acts by the defendants." *Id.* at 3. The Court determined that Plaintiffs "are not  
4 allowed to seek separate and additional damages for annoyance, inconvenience,  
5 discomfort or mental anguish . . . ." *Id.* at 8.

6 On April 1, 2013, Plaintiff's filed the instant motion for reconsideration, arguing  
7 that BNSF raised the argument regarding damages for the first time in its reply brief, that  
8 Plaintiffs have not had the opportunity to respond, and thus the Court should modify its  
9 order by limiting it to the relief BNSF requested: "dismissal of Plaintiffs' trespass and  
10 nuisance claims." Dkt. 84 at 1-2.

## 11 II. DISCUSSION

12 Motions for reconsideration are governed by Local Rule CR 7(h), which provides  
13 as follows:

14 Motions for reconsideration are disfavored. The court will ordinarily  
15 deny such motions in the absence of a showing of manifest error in the  
16 prior ruling or a showing of new facts or legal authority which could not  
17 have been brought to its attention earlier with reasonable diligence.

18 Local Rule CR 7(h)(1).

19 In this case, Plaintiffs do not argue that the Court committed a manifest error of  
20 law. Rather, Plaintiffs ask the Court to reconsider the scope of its order and, in particular,  
21 the language stating that Plaintiffs "are not allowed to seek separate and additional  
22 damages for annoyance, inconvenience, discomfort or mental anguish, as such damages  
are not recoverable for negligence claims under Washington law." Dkt. 84 at 2 (*citing*

1 Dkt. 83 at 8). Plaintiffs argue that the issue of whether Plaintiffs may recover these  
2 damages under negligence (as opposed to nuisance theory) was not raised as an issue by  
3 BNSF in its initial brief, but only in its reply. *Id.* Thus, Plaintiffs essentially maintain  
4 that, as a matter of fairness and equity, the Court should not consider the argument raised  
5 for the first time in BNSF's reply to which Plaintiffs did not have the opportunity to  
6 respond. *Id.*

7 Although "[t]he district court need not consider arguments raised for the first time  
8 in a reply brief," it nevertheless has the discretion to do so. *Zamani v. Carnes*, 491 F.3d  
9 990, 997 (9th Cir. 2007). Here, BNSF's reply brief does not raise new issues or  
10 arguments. Rather, BNSF's brief replies to specific arguments involving damages raised  
11 in Plaintiffs' responsive brief.

12 Once the parties agreed that the alleged nuisance and trespass had their origin in  
13 negligence and, as such, are subsumed in negligence, then the damages may be restricted  
14 to those recoverable for that cause of action. As noted above, in their response to  
15 BNSF's motion, Plaintiffs provided argument regarding the specific type of damages that  
16 should be available to them. Now, Plaintiffs attempt to argue that in their responsive  
17 brief they made only a "limited argument" "that their nuisance theory should remain  
18 viable for the purposes of damages." Dkt. 84 at 4. Plaintiffs contend they did not address  
19 the "separate issue of whether they were entitled to damages" "under theories of  
20 negligence." *Id.*

21 However, in this case, the Court finds Plaintiffs' attempt to argue that they did not  
22 address the "separate issue" of whether they were entitled to damages under theories of

1 negligence unpersuasive. As the Court summarized in its prior order, Plaintiffs argued  
 2 that they were entitled to recover specific types of damages under nuisance theory, even  
 3 where, as here, the cause of action pending before the Court is negligence.<sup>1</sup> See Dkt. 79  
 4 at 3-6. In fact, while the Court recognizes that Plaintiffs asserted that “the issue of  
 5 damages is for another day” (*id.* at 5), their arguments regarding what type of damages  
 6 are available to them, which comprises about half of their responsive brief, indicates that  
 7 Plaintiffs understood that damages may indeed be at issue. In what the Court views as an  
 8 argument in the alternative (i.e. if damages are at issue), Plaintiffs took the opportunity to  
 9 make their position clear regarding which damages they are entitled to in this type of  
 10 action. Further, in reply to Plaintiffs’ damages argument, BNSF devoted almost the  
 11 entirety of its responsive brief to arguing that Plaintiffs are not entitled to seek damages  
 12 for personal discomfort, annoyance, irritation and anguish. See Dkt. 80 at 2-7. If the

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13  
 14 <sup>1</sup> In its prior order, the Court summarized the majority of Plaintiffs’ responsive arguments regarding damages as follows:

15 Plaintiffs argue they are entitled to damages recoverable under a nuisance theory,  
 16 i.e., the loss of use and enjoyment of their property, personal discomfort, annoyance,  
 17 irritation and anguish. Dkt. 79 at 4 (*citing Wilson v. Key Tronic Co.*, 40 Wn. App. 802,  
 18 809-11(1985) setting forth damages available under nuisance theory). Plaintiffs contend  
 19 there is a specific purpose underlying the rule that “a ‘negligence claim presented in the  
 20 garb of nuisance’ need not be considered apart from the negligence claim.” *Id.* (*citing*  
 21 *Atherton*, 115 Wn.2d at 527 (*quoting Hostetler*, 41 Wn. App. 343, 360, 704 P.2d 1193  
 22 (1985), *review denied*, 106 Wn.2d 1004 (1986))). They argue that “[t]he purpose is not to  
 limit recoverable damages, but to ensure a party does not escape application of the rules  
 of negligence (e.g., contributory negligence) by relabeling a claim as nuisance when the  
 wrongful conduct giving rise to the nuisance is a negligent act or omission.” *Id.* at 4  
 (*citing see Hostetler*, 41 Wn. App. at 360; *Albin*, 60 Wn.2d 745, 753 (1962)). Here,  
 Plaintiffs maintain “they are not attempting to use nuisance to cut-off the defense of  
 contributory negligence.” *Id.* They further contend that none of the cases cited by  
 Defendants support the position that Plaintiffs are not entitled to the damages they seek.  
*Id.* at 4 & 5.

Dkt. 83 at 5-6.

1 Plaintiffs believed Defendants' reply contained new argument on additional legal issues  
2 to which they were not provided a fair opportunity to respond, Plaintiffs should have  
3 moved the Court to strike arguments that were improperly raised in the reply brief and/or  
4 sought the opportunity to file a surreply or supplemental brief with additional legal  
5 argument responding to Defendants' newly raised arguments. Though Plaintiffs had the  
6 time to do either, prior to the Court's ruling on Defendants' motion, Plaintiffs did neither.

7 However, in the interests of fully resolving all legal issues before it, the Court will  
8 provide Plaintiffs the opportunity to file a brief in support of their contention that they are  
9 entitled to pursue the damages they seek under nuisance theory, i.e. "personal discomfort,  
10 annoyance, irritation and anguish." Dkt. 79 at 4. BNSF may file a response to Plaintiffs'  
11 brief. Plaintiffs' brief, which is not to exceed 12 pages, must be filed by April 17, 2013.  
12 BNSF's response, which is not to exceed 10 pages, must be filed by April 24, 2013. The  
13 motion for reconsideration is renoted for consideration on April 24, 2013.

### 14 **III. ORDER**

15 Therefore, it is hereby **ORDERED** that the parties may file additional briefing in  
16 accordance with the schedule set forth above and the motion for reconsideration (Dkt. 84)  
17 is renoted to April 24, 2013.

18 Dated this 10th day of April, 2013.

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21 BENJAMIN H. SETTLE  
22 United States District Judge